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In the

# Supreme Court of the United States

October Term, 1996

DOROTHY A. BASILE,
*Petitioner,*

v.

TOWN OF SOUTHAMPTON,
*Respondent.*

On Petition for Writ of Certiorari
to the Court of Appeals
for the State of New York

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the attached amicus curiae brief in support of the petitioner, Dorothy A. Basile. Consent to the filing of this brief has been granted by counsel for petitioner and has been lodged with the Clerk of this Court. Respondent, the Town of Southampton, has withheld consent, necessitating the filing of this motion.

### IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF)[1] is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has over 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief amicus curiae in this case.

PLF has participated in numerous cases involving constitutional protection of property rights before this Court. Particularly noteworthy of PLF's involvement in land use and the Takings Clause cases, PLF attorneys were counsel of record in

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

*Nollan v. California Coastal Commission*,[2] and *Suitum v. Tahoe Regional Planning Agency*.[3] PLF attorneys also represent petitioners in two closely related cases, *Anello v. Zoning Board of Appeals of Village of Dobbs Ferry*[4] and *Kim v. City of New York*.[5] PLF participated as amicus curiae in *Agins v. City of Tiburon*,[6] *Keystone Bituminous Coal Association v. DeBenedictis*,[7] *Hodel v. Irving*,[8] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*,[9] *Lucas v. South Carolina Coastal Council*,[10] *Dolan v. City of Tigard*,[11] and *Babbitt v. Youpee*.[12]

PLF seeks to augment the argument in support of the petitioner. PLF believes that its public policy perspective and litigation experience in support of property rights will provide an additional needed viewpoint with respect to the issues presented by this case.

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[2] 483 U.S. 825 (1987).

[3] 65 U.S.L.W. 4385 (U.S. May 27, 1997) (No. 96-243).

[4] Appeal docketed, No. 96-1880.

[5] Appeal docketed, No. 96-1794.

[6] 447 U.S. 255 (1980).

[7] 480 U.S. 470 (1987).

[8] 481 U.S. 704 (1987).

[9] 482 U.S. 304 (1987).

[10] 505 U.S. 1003 (1992).

[11] 512 U.S. 374, 114 S. Ct. 2309 (1994).

[12] __ U.S. __, 117 S. Ct. 29 (1997).

For the above reasons, Pacific Legal Foundation requests that its motion to file the following brief amicus curiae be granted.

DATED: June ___, 1997.

Respectfully submitted,

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## QUESTION PRESENTED FOR REVIEW

**May a state take private property by condemnation and deny the landowner-condemnees just compensation by precluding them from presenting evidence of the value of the condemned property independent of the impact of confiscatory land use restrictions that were adopted before the owner-condemnees acquired title?**

# BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

## INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion and are adopted herein.[1]

## STATEMENT OF THE CASE

In 1980, Mrs. Basile's family acquired 12 acres of residentially zoned property in the Town of Southampton. Petition for Writ of Certiorari at Appendix (App.) A-1. The land was subject to state and municipal land use restrictions based on its location within wetlands and floodplain overlay districts. App. A-1-2. Under an existing covenant, permission from the Southampton Planning Board would be required before a home could be constructed on the land. App. A-2.

In 1990, the Town of Southampton condemned Mrs. Basile's land. The Town valued the land at $117,500, based upon the existence of wetlands restrictions which were alleged to have precluded residential development. App. A-13. Experts for Mrs. Basile appraised her lot at $960,000, the value of the lot without the restrictions. The trial court limited Mrs. Basile's condemnation award to the lesser amount. App. A-17. Rejecting Mrs. Basile's appraisal, the court noted that she acquired her property after the imposition of regulations

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity, other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

which restricted the land to "recreational or aesthetic purposes." App. A-17.

The Supreme Court, Appellate Division, affirmed the lower valuation of Mrs. Basile's lot. App. A-9. The appellate court observed that the land use restrictions precluded Mrs. Basile from building on her lot. Therefore, she

> did not have any reasonable investment-backed expectation of building on the property, the potential of building on the property was not part of her title to begin with, and there was no categorical regulatory taking.

App. A-10. Citations omitted.

The New York Court of Appeals affirmed, observing that the valuation of condemned property should reflect existing restrictions. App. A-3. The court also noted that property interests are *redefined* by land use restrictions. *Id.*

> Whatever taking claim the prior landowner may have had against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such a claim was not owned by [Mrs. Basile] who took title after the redefinition of the relevant property interests.

*Id.*

## REASONS FOR GRANTING THE WRIT

### SUMMARY

The New York Court of Appeals ruled that Mrs. Basile was not entitled to payment of the fair-market value of her land condemned by the Town of Southampton. Although the application of the restrictions denied Mrs. Basile all but "recreational or aesthetic" uses of her land, the court held that she did not have the right to challenge the restrictions because she acquired her property after the land use restrictions were enacted. The New York court has thereby determined that one of the most essential

of all property rights–the right to use–may be eliminated by legislative enactment. Furthermore, when the Town of Southampton used these legislative enactments to render useless and devalue Mrs. Basile's land, which it thereafter condemned, the town had only to pay a fraction of the true value of her land, thereby avoiding the constitutional requirement of just compensation. The New York court has thereby undermined an essential premise in condemnation law that the price the government must pay for land it takes is the fair-market value–the amount for which a willing buyer would purchase the property.

On the same day the Court of Appeals decided Mrs. Basile's case, New York's highest tribunal also decided three other cases on essentially identical grounds.[2] Together these decisions establish what amounts to a judicial doctrine that property rights can be transferred by legislative *fiat* to the state without payment of just compensation.[3]

The New York court's doctrine is antithetical to deeply rooted understandings of the relationships that define *property*. The New York court's treatment of these understandings

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[2] *Anello v. Zoning Board of Appeals of Village of Dobbs Ferry*, 1997 WL 68232 (N.Y. Feb. 18, 1997), *appeal docketed*, No. 96-1880 (U.S. May 26, 1997); *Gazza v. New York Department of Environmental Conservation*, 1997 WL 68590 (N.Y. Feb. 18, 1997), and *Kim v. City of New York*, *supra*. The New York court's *per se* rule that land use restrictions can be insulated from challenge once property is transferred was applied to each of these cases, resulting in the owners being denied the ability to make economically beneficial use of their property or being forced to suffer an occupation without receiving just compensation.

[3] Less than one week after the Court of Appeals crafted its doctrine, lower courts began applying and extending it. In *Brotherton v. Department of Environmental Conservation of the State of New York*, No. 12809-90 (N.Y. Feb. 24, 1997), a trial court held that an owner who was precluded from making any economical use of his land had no protected property interest because restrictive regulations were adopted prior to the property's transfer from a wholly owned corporation to the firm's sole shareholder. *The sole legal ground cited for this decision was the new doctrine of the Court of Appeals which is the subject of the present petition.*

is contrary to that of at least four other states' courts–Florida, Massachusetts, Michigan, and New Jersey–which have demonstrated a respect for the principles upon which our takings jurisprudence has been based.[4] The doctrine is also inconsistent with long-standing policies permitting owners of condemned private land to present evidence of the value of their land in the absence of land use restrictions that have a probability of being changed.[5] Although Mrs. Basile's case does not involve a

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[4] *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, 1229 (5th Dist. Fla.), *review denied*, 613 So. 2d 3 (Fla. 1992) (a property owner entitled to compensation under Fifth Amendment where permit request to build home in residentially zoned land denied, based on the property's status as a wetlands); *Lopes v. City of Peabody*, 595 N.E.2d 812 (1992), *review denied*, 600 N.E.2d 171 (1992), *cert. granted and judgment vacated*, 507 U.S. 981 (1993), *on remand*, 629 N.E.2d 1312, 1314-15 (1994) (purchaser of land subject to land use restriction at the time of purchase has every right to challenge the continued application of the restriction); *K&K Construction, Inc. v. Department of Natural Resources*, 551 N.W.2d 413 (1996), *leave to appeal granted*, 106712 (Mich. Sup. Ct. Apr. 28, 1997) (timing of a regulation and acquisition of property cannot act to preclude just compensation where it would otherwise be due); *Moroney v. Mayor and Council of the Borough of Old Tappan*, 633 A.2d 1045, 1048 (1993), *cert. denied*, 642 A.2d 1004 (1994) (property owners "stand in the shoes of their predecessors in title" to challenge local zoning ordinance).

[5] *See, e.g., United States v. 15.65 Acres of Land in Marin County*, 689 F.2d 1329, 1333 n.3 (9th Cir. 1982); *Government of Virgin Islands v. 2.7420 Acres of Land*, 411 F.2d 785, 786 (3d Cir. 1969) (evidence of value for use prohibited by existing zoning admissible where change in zoning restrictions was reasonably probable in the reasonably near future); *Wolff v. Commonwealth of Puerto Rico*, 341 F.2d 945, 946 (1st Cir. 1965) (highest and best possible use of property is not confined to the use or zoning at the time of taking if zoning may be amended to permit other uses).

> When "there is a possibility or probability that the zoning restriction may in the near future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon present market value."

(continued...)

challenge raising the probability of change, she did base her higher valuation of her condemned land on the allegation that the land use restrictions as applied to her property would in all likelihood be ruled unconstitutional. App. A-15. Under the court's doctrine, neither of these types of postregulation challenges–those based on likelihood of change or on the likelihood of successful challenge–could be brought by property owners acquiring their land after the adoption of land use restrictions.

Furthermore, the doctrine will prevent property owners from being able to challenge preexisting regulations which have the effect of depressing the value of condemned land.[6] The doctrine leaves a government unconstrained to redefine property interests without regard for constitutional limits,[7] and threatens to render a nullity the Takings Clause of the Fifth Amendment to the United States Constitution.

It is imperative that this Court grant certiorari to reconcile the conflicts created by this New York decision and restore fundamental rights eliminated by the New York doctrine.

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[5] (...continued)
NICHOLS ON EMINENT DOMAIN, 3d ed., Vol. 4, § 12.322, *quoted in Wolff*, 341 F.2d at 946-47. *See also* ZONING AS A FACTOR IN DETERMINATION OF DAMAGES IN EMINENT DOMAIN, 9 ALR 3d 291, 309.

[6] In *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961), this Court noted that "it would be manifestly unjust to permit a public authority to depreciate property values ... and then to take advantage of this depression in the price which it must pay for the property when eventually condemned. *Id.* at 636. Citations omitted.

[7] *See Lucas*, 505 U.S. at 1014 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922) (warning that such powers to redefine property must be constrained by constitutional limitations. Otherwise, the tendency would be to increasingly qualify uses of private property until none remained)).

## I

## THE DOCTRINE OF THE NEW YORK COURT OF APPEALS UNDERMINES THE CONSTITUTIONAL OBLIGATION THAT JUST COMPENSATION–THE FAIR-MARKET VALUE–BE PAID WHEN PRIVATE PROPERTY IS CONDEMNED

"Eminent domain" is the fundamental power of the sovereign to take private property for a public use without the owner's consent.[8] The power of eminent domain is an inherent attribute of sovereignty not derived from the Constitution.[9] However, when this power is exercised, the government is obligated under the Fifth Amendment to the Constitution of the United States[10] to pay just compensation to the owner of the property taken.[11]

When private property is taken for public use, this Court has long held that just compensation must be paid.[12] The amount of compensation is based on the value of the property taken, not

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[8] 1 NICHOLS ON EMINENT DOMAIN § 1.11 (rev. 3d ed. 1996).

[9] *See, e.g., Kohl v. United States*, 91 U.S. 367, 371 (1875) (right of eminent domain exists in the United States government); *City of Cincinnati v. Louisville & Nashville Railroad Co.*, 223 U.S. 390, 400 (1912) ("[T]he right of every state to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to state governments, without which they could not well perform their great functions."); *Daniels v. State Road Department*, 170 So. 2d 846 (Fla. 1964) (power of eminent domain not derived from constitution).

[10] The Fifth Amendment provides in part that "private property [shall not] be taken for public use without just compensation."

[11] *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 9 (1984). The Takings Clause of the Fifth Amendment is applicable to state and local government via the Fourteenth Amendment. *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 235-37 (1897).

[12] *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 315 (1795).

any "out of pocket" investment lost by the owner.[13] No matter what Mrs. Basile paid for her land, even if she had acquired it for no consideration, the Fifth Amendment's requirement of "just compensation" would require that she be paid its fair-market value.[14]

However, this Court has deviated from this rule, for instance,

> when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.[15]

Injustice is found where the police power has been used to systematically reduce the value of land in anticipation of its condemnation.[16] In this case, it would be manifestly unjust to permit the Town of Southampton to depreciate Mrs. Basile's land by limiting its uses to recreational or aesthetic purposes and then take advantage of this depreciation when her land is condemned.[17] This is precisely what was done when the New York Court of Appeals refused to permit Mrs. Basile to challenge the valuation of her land based on the application of restrictions which deprived her of all but recreational or aesthetic uses of her land.

The land use restrictions applied to Mrs. Basile's property precluded all but aesthetic–nondevelopment–uses of her

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[13] *United States v. 50 Acres of Land*, 469 U.S. 24, 25-26 (1984) (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943) ("what a willing buyer would pay in cash to a willing seller")).

[14] In most cases, just compensation means the fair market value of the property–what a willing buyer would pay in cash to a willing seller–on the day it is appropriated. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-13 (1979).

[15] *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950); *Kirby Forest Industries*, 467 U.S. at 10 n.14.

[16] *See, e.g., Riggs v. Township of Long Beach*, 538 A.2d 808 (N.J. 1988).

[17] *See Virginia Electric & Power Co.*, 365 U.S. at 636.

land. In *Lucas*, this Court explicitly held that regulations that deny all beneficial use of land are categorical violations of the Takings Clause.[18] With very limited exceptions, the government may not avoid the obligation to pay just compensation when land use regulations render private property useless.[19]

Under the doctrine crafted by the New York court, Mrs. Basile is not entitled to just compensation based on a valuation that ignores the confiscatory land use restrictions–simply because she acquired the property after the restrictions were adopted. The application of this rule to Mrs. Basile precluded her from introducing evidence of the value of her land that existed prior to adoption of the confiscatory regulations that she alleged were unconstitutional under this Court's *Lucas* opinion.

The result in this case is manifestly unjust; the result of the application of the subject land use restrictions is to render land useless. Under this Court's decision in *Lucas*, regulations that preclude all but aesthetic uses of land constitute categorical takings of private property. However, the New York court precludes landowners from challenging as takings land use restrictions enacted before they acquire their property, even when the restrictions preclude all economically viable uses[20] of, or allow the government to occupy, private property.[21]

By precluding landowners from bringing takings challenges to land use restrictions in effect when the property is acquired, the New York court has allowed the government, in anticipation of acquiring property, to enact restrictions or deny

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[18] *Lucas*, 505 U.S. at 1015.

[19] *Id.*

[20] *See, e.g., Anello v. Village of Dobbs Ferry, supra*, in which the New York court precluded a challenge to land use restrictions that precluded all use of private land.

[21] *See, e.g., Kim v. City of New York, supra*, in which the New York court precluded landowners from preventing the city from permanently occupying their land.

uses of land merely for the purpose of decreasing land values and concomitantly lowering acquisition costs in eminent domain proceedings.

Beyond *Anello* and *Gazza*, where property owners were denied the ability to use their land, the court expanded the doctrine in this case to deny just compensation when land is condemned. The court discarded universally accepted principles of condemnation law that when the government takes land, it must pay the same as any willing buyer so that the property owner is made whole.[22]

Justice Holmes observed that

> [t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without [just] compensation.[23]

The New York court's newly crafted doctrine precludes property owners from challenging land use restrictions adopted before they acquire their land. Under this new doctrine, the government can render Mrs. Basile's property utterly useless through regulation, depress its value to insignificance, and then take the property through condemnation for a pittance of its nonregulated value. This new, unprecedented doctrine makes a mockery of the Just Compensation Clause and must be reviewed by this Court.

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[22] In *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973), this Court held that "'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken."

[23] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415.

## II

## THE NEW YORK COURT OF APPEALS ALTERS FUNDAMENTAL PROPERTY RIGHTS IN A MANNER INCONSISTENT WITH THE UNITED STATES CONSTITUTION AND THE DECISIONS OF THIS COURT

In *Gazza v. New York State Department of Environmental Conservation*, decided the same day as *Basile*, the New York Court of Appeals held that all existing land use regulations formed part of Mr. Gazza's title to his land, limiting the interests upon which he could base any claim. As a result, the court left him without a remedy when he was precluded from building a home on his residentially zoned lot. Similarly, in *Anello v. Village of Dobbs Ferry*, the court's holding rendered Mrs. Anello's residential lot useless; in *Kim v. City of New York*, the court's holding left Mrs. Kim powerless to prevent the city from permanently occupying her land.

While the physical invasion in *Kim* represents the most obvious manifestation of the error in the New York court's doctrine, this case represents a logical (but illegitimate) extension of the court's doctrine as applied in the regulatory takings analyses found in *Gazza* and *Anello*. Once regulations have rendered property all but valueless, is there any reason why a condemnor should pay the preregulation fair-market value of the land? In Mrs. Basile's case, the New York courts issued a resounding "no." The issues in this case are in many ways similar to those in *Gazza* and *Anello*. However, in this case, the courts allowed the definition of property to be altered to preclude all uses of Mrs. Basile's land and then allowed the government to take it in what amounts to a fire sale.

In its amicus brief in support of Mr. Gazza, Pacific Legal Foundation argued, among other things, that the government should not be permitted to redefine the range of interests that constitute property, thereby precluding many landowners from challenging restrictions that deprive them of their property in derogation of the Fifth Amendment's Takings Clause. In the

following portion of this brief, amicus reiterates and amplifies those legal arguments as they apply to this different factual situation.

### A. Property Consists of Constitutionally Protected Relationships

This Court has never explicitly defined *property*, instead defining "the range of interests [qualifying] for protection as 'property'" based on "existing rules or understandings" stemming from sources independent of the Constitution.[24] *Property* is understood to mean

> the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. ... The constitutional provision is addressed to every sort of interest the citizen may possess.[25]

The essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well-grounded to support a claim of entitlement.[26] These claims for which the owners were entitled to protection have attached to a

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[24] *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1030 (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

[25] *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 n.6 (1980); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

[26] *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (property consists of recognized expectancies); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (property involves mutually explicit understandings). *See also Nixon v. United States*, 978 F.2d 1269, 1275-76 (D.C. Cir. 1992).

wide variety of things[27] and varying degrees of possessory interests.[28]

A cornerstone of any meaningful regime of private property is the recognition that the right to use property is an inherent attribute of ownership.[29] If this recognition is denied, then the ability to use property is no more than a government privilege or entitlement. Property ownership without the right of use would be an empty formalism, incapable of performing its crucial social function of providing a bulwark of personal autonomy against the encroachments of an aggressive, over-reaching state.[30]

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[27] *Board of Regents of State Colleges v. Roth*, 408 U.S. at 571-72) (property interests extend well beyond actual ownership of real estate, chattels, or money). *See also Florida Rock Industries v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

> Property interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and nonpossessory.

*Id.* at 1572.

[28] *See, e.g., United States v. Virginia Electric & Power*, 365 U.S. at 638 (Douglas, J., concurring) (Owners of an easement and subservient fee have parts of the bundle of rights or possessory interests that represent "property" within the meaning of the Fifth Amendment.); *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (owners of reversionary interest in easement entitled to just compensation when government took interest). *See also* 1 EDWARD COKE, INSTITUTES ch. 1, § 1 (1st Amer. ed. 1812). "For what is the land but the profits thereof[?]"

[29] *See Nollan*, 483 U.S. at 833 n.2 ("[T]he right to build on one's property ... cannot remotely be described as a 'governmental benefit.'"). *See, e.g.*, Robert Nozick, *Anarchy, State, and Utopia* 171 (1974) ("[t]he central core of the notion of a property right in X ... is the right to determine what shall be done with X"); *United States v. Causby*, 328 U.S. 256, 261 (1946).

[30] *See* Friedrich A. Hayek, *The Road to Serfdom*, 103-04 (1944) (system of private property rights assures "that nobody has complete power over us, that we as individuals can decide what to do with ourselves").

> [T]he only dependable foundation of personal liberty is the personal economic security of private property ... That is why the Englishman's belief that his home is his castle and that the king cannot enter it ... [is] the very essence of the free man's way of life.[31]

When the New York court held that all existing land use regulations formed part of Mrs. Basile's title to her land and thereby limited the evidence she could present in support of her valuation of her land when it was condemned, the court redefined property. This redefinition frustrates mutually reinforcing understandings that are property's essential character. It places the value of her land in the hands of those who wish to take it from her and undermines the very essence of the Fifth Amendment's guarantee of just compensation.

### B. Property Is Not Defined Each Time Property Is Transferred But Rather When the Fundamental Relationships Are First Established

"Individual freedom finds tangible expression in property rights."[32] However the power of the state to alter the definition of *property* must have certain constitutional limits if property rights are to have any sense.

In *Lucas*, this Court observed that the Fifth Amendment's just compensation requirement is triggered when "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of [the] title to begin with."[33]

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[31] Walter Lippmann, *The Method of Freedom* 100-02 (1934), *quoted in Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1175 n.8 (Fed. Cir. 1994).

[32] *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993).

[33] *Lucas*, 505 U.S. at 1027.

*Property* is defined when the relationships between specific people and the things they own are first recognized by law. However, the New York court's doctrine ignores the importance of this instant in a title's history. Instead, the court redefines each successive owners' title by all laws in effect on the date the title was transferred. This practice renders any "antecedent inquiry" under *Lucas* meaningless since, according to the lower court, antecedent is no further back in time than the moment the property was last acquired. This doctrine reaches an illogical result, inconsistent with long-standing principles of property law, as well as the holdings of this Court and the Court of Appeals for the Federal Circuit.[34]

When property is transferred without any interests being retained by the prior owner, the new owner is said to "stand in the shoes" of the predecessor in interest.[35] It is fundamental that as the cycle of property transfer is repeated, the property remains unaltered as the owners are substituted, one for another.

However, reliance on fundamental principles seems misplaced if every land use restriction alters the title at the instant land is transferred from one owner to another. Under the New York court's doctrine, the state takes from the new owner part of the "bundle" of rights whenever property changes hands. As a result, the state would never have to pay just compensation for the portions of property taken before land was transferred. Over time, either transfer of ownership will cease or the state will acquire all of the interests it desires in property by operation of law. With the same passage of time, owners will lose any basis for bringing takings claims under the Fifth Amendment as their titles lose meaning with every transfer.

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[34] *See Pennsylvania Coal* and *Lucas*, discussed *ante*; and *Preseault*, discussed *infra*.

[35] *Graff v. Smith's Admors*, 1 U.S. 481, 485 (1789). *See also Moroney*, 633 A.2d at 1048 (property owners, just like their predecessors in title, can challenge local zoning ordinance).

The New York court's doctrine permits government to engage in regulatory incrementalism, eventually depriving owners of all interests in their private property without paying just compensation. Under the lower court's logic, the government could annually increase set-back requirements by six inches, each year reducing the amount of land on which an owner could build a home until eventually nothing was left. Only the increases since the property was last transferred would be relevant to a takings analysis. But the proper analysis would involve a comparison of the total cumulative regulatory impact on property to the original title, regardless of when and how often the land may have been transferred.

In *Lucas*, this Court noted that the government could prohibit uses of land without implicating the constitutional requirement to pay just compensation[36] only if "the use of these properties for what are now expressly prohibited purposes was *always* unlawful."[37] The land use restrictions that would meet *Lucas'* test of constitutionality would not create new limitations on existing titles but, instead, merely recognize historically prohibited uses.[38] The restrictions would do no more than state that which the owners were never free to do with their land.

What *Lucas* implied, the Court of Appeals for the Federal Circuit has expressly stated. In *Preseault v. United States*, the

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[36] *Lucas*, 505 U.S. at 1029.

> On this analysis, the owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.

*Id.*

[37] *Id.* at 1030 (emphasis added).

[38] *Id.*

Federal Court held that property owners could challenge the conversion of easements dedicated for railroad rights of way to bicycle and hiking trails, even though the law under which the easements were converted was enacted before the property owners acquired their property.[39]

Under reasoning strikingly similar to that of the lower court in this case, the United States argued that the Preseaults' property interests in the tract were not defined when the railroad acquired its rights-of-way in 1899, but by the evolving enactment and implementation of law between 1899 and the dates the Preseaults acquired the land.[40]

The Federal Circuit Court of Appeals categorically rejected the thesis that general legislation enacted after the creation of the property interests "somehow redefined state-created property rights and destroyed them without entitlement to compensation."[41] Rather, the rights were defined by the original conveyances and remained unchanged notwithstanding subsequent regulatory enactments.[42] Specifically, the federal court stated that

> [t]he question of what estates in property were created by these turn-of-the-century transfers to the Railroad requires a close examination of the conveying instruments, read in light of the common law and statutes of Vermont *then in effect*.[43]

Property owners in New York have always enjoyed the right to buy and sell land. Before the lower court crafted its doctrine, new owners acquired all of the bundle of rights

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[39] *Preseault*, 100 F.3d at 1530-31.

[40] *Id.* at 1537.

[41] *Id.* at 1530.

[42] *Id.* at 1537.

[43] *Id.* at 1534 (emphasis added).

previously enjoyed by the old owners.[44] When Mrs. Basile purchased her land, she should have acquired the very same protectable interests enjoyed by her predecessors in interest–but the court below declared that she did not.

The New York court's doctrine upsets this historically rooted understanding of property rights. The doctrine precludes Mrs. Basile from receiving just compensation when her property is condemned because the doctrine bars consideration of potential challenges to regulations that preclude all use of her land but were adopted before she acquired her lot. Furthermore, the doctrine permits the state to devalue property by eliminating all productive uses and then condemning the land and paying only a small fraction of the land's true value.[45] Such a doctrine should be reviewed by this Court.

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[44] In *Douglaston Manor, Inc. v. Bahrakis*, 678 N.E.2d 201 (N.Y. 1997), decided shortly before this case, the New York Court of Appeals observed that

> the desirable definiteness attendant upon discrete property rights and principles, along with reliable, predictable expectations built upon centuries of precedent, ought not be sacrificed to the vicissitudes of unsupportable legal theories.

*Id.* at 205.

[45] As demonstrated by the facts of this case, the New York court's theory is that any land use that is subject to discretionary government approval is deleted from the title when it passes from one owner to another; only uses *of right* may pass with the title. Under this theory, a legislature could pass laws eliminating all uses of land *of right*. If land were thereafter transferred and then condemned, it would have little if any value because the owner's title would include no rights of use. Consistent with the New York court's theory, the comprehensive land use regulations existing in many jurisdictions which are tantamount to the elimination of all uses *of right* would abrogate any obligation under the Fifth Amendment to pay just compensation when private property is condemned.

### C. The Government Cannot Deprive Owners of Expectancies Based on Established Property Relationships Without Triggering Fifth Amendment Liability

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, this Court stated that the government does not have unlimited power to redefine the sphere of interests defining private property, the power "by *ipse dixit* [to] transform private property into public property without compensation."[46] No state has the right to destroy expectations based on long-established relationships between people and things, "defeat[ing] the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."[47]

One of the reasons for this rule is to prevent the government, under the rationale of adjusting the benefits and burdens of economic life, from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[48]

In this case, however, the New York Court of Appeals ignored this fundamental principle of United States Supreme Court property law and told Mrs. Basile that she never possessed the right to use her property except for recreational or aesthetic purposes. The court decreed that Mrs. Basile was entitled neither to use her land for purposes consistent with its residential zoning nor to just compensation for the forced dedication of her lot for a public purpose–essentially undevelopable open space.

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[46] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). *See also Loretto*, 458 U.S. at 439.

[47] *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).

[48] *Webb's Fabulous Pharmacies*, 449 U.S. at 163 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Under the New York court's holding, the state is free to ignore long-standing expectations of rights in private property protected under the Fifth Amendment to the United States Constitution. Under the court's holding, the state is free by *ipse dixit* to transform without paying just compensation private property into public property with every land transfer. Such a ruling conflicts with this Court's precedent and requires review.

## CONCLUSION

The New York court's doctrine unilaterally redefines property, thereby depriving individuals of fundamental constitutional rights. The court permits the state to convert private property into public property without paying just compensation. The court sets aside long-standing principles that, in instances of eminent domain, the government must make the landowner whole by paying the fair-market value of the property taken. Only this Court can resolve the serious conflicts created by the New York court and undo the damage inflicted upon important constitutional rights. For the reasons stated above, the petition for writ of certiorari should be GRANTED.

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Respectfully submitted,

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